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Supreme Court, U.S.
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No. 87-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH, JAN HIRSCH VAN HORN, JOE CORDILL, MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners,

—v.—

NABISCO BRANDS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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31 pp

QUESTION PRESENTED

Whether Nabisco Brands, Inc.'s tender offer to purchase petitioners' $3.50 Preferred Stock at $50 per share was lawful under its Certificate of Incorporation.

TABLE OF ABBREVIATIONS

The following abbreviations have been used in Respondent's brief:

REC .....Record, page 1

TR 1 .....Transcript of Trial, page 1

REC Vol. III, 2...Volume III of the Record, page 2

P Ex. 1, 4 .....Petitioners' Exhibit 1, page 4

R Ex. 1, 3 .....Respondent's Exhibit 1, page 3

P BR. 23.....Petitioners' Brief, page 23

LISTING OF INTERESTED PARTIES IN ACCORDANCE WITH S. CT. RULE 28.1

RJR Nabisco, Inc., its subsidiaries and affiliates, including the largest thereof, respondent Nabisco Brands, Inc., and its wholly-owned subsidiaries and affiliates. In addition, a subsidiary of RJR Nabisco, Inc., Nabisco Brands, Ltd. (Canada), is owned 80% by RJR Nabisco, Inc. and 20% by the public, and is listed on the Montreal Stock Exchange.

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STATEMENT

This action arose as a result of a garden variety tender offer made by Nabisco Brands, Inc. ("NBI") on May 30, 1983 for any or all of 119,992 outstanding shares of its $3.50 Cumulative Preferred Stock at the price of $50.00 per share. P Ex. 3; P Ex. 6, 3; TR 149. All petitioners were holders of the preferred stock, and all except Frank D. Bunton tendered some or all of their shares in accordance with the terms of the offer. TR 44-45, 60-61, 75-77, 86, 96, 98. Petitioner Cerf Hirsch tendered approximately 12,000 shares of the 97,696 purchased by NBI and received approximately $600,000. TR 149.

The gravamen of petitioners' contention is that they should have received the redemption price of $100 per share instead of the tender offer price of $50 per share because "the purchasers of the new [Nabisco preferred shares] knew the history of the prior preferred stock redemptions and the logical corollary that Nabisco would probably redeem the preferred stock in the future." P BR. 3-4, 8. The putative "prior . . . redemptions" (*Id.*) were 1929, 1937 and 1946 redemptions of other issues by Standard Brands, Inc., which had no relationship with Nabisco Brands, Inc. until 1981 when it combined with Nabisco, Inc. to form Nabisco Brands, Inc. And the so-called "logical corollary" is in fact a legal non-sequitur, if petitioners' argument is that their legal rights are enhanced by some irrelevant history of Standard Brands, Inc., with Cerf Hirsch the only historian. There was no other nexus between such "redemptions" and this tender offer.

On August 15, 1985, more than two years after the date of the tender offer, petitioners filed a complaint in the Eastern District of Texas, Tyler Division against NBI, alleging that the tender offer violated §§ 10(b), 13(e) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b); 78m(e), and 78n(e), respectively (hereinafter "§§ 10(b), 13(e) and 14(e) of the 1934 Act") and Rules 10b-5, 13e-3 and 14(e) promulgated thereunder, § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77(a), (hereinafter "§ 17(a) of the 1933 Act"), § 27.01 of the

Texas Bus. & Comm. Code, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq*. Petitioners also alleged that the offer represented a breach of contract, a breach of fiduciary duty by NBI directors (who were not even named as defendants), coercion, *de facto* redemption, *ultra vires* and others. Few meritorious claims require such an avalanche of theories to establish them.

The action was tried before a jury on May 8 and 9, 1986. On motion by NBI, the court directed a verdict in NBI's favor on the RICO claim, the claim of fraud under § 17(a) of the 1933 Act, and the claim of *ultra vires*. TR 146-48. After a jury verdict in NBI's favor on the contract, fraud, and all other theories and claims submitted to it, plaintiffs appealed. The appeal was argued in the Court of Appeals for the Fifth Circuit on April 10, 1987. On April 13, 1987, the court affirmed the judgment below without opinion.

SUMMARY OF THE ARGUMENT

There are no "special and important reasons", Sup. Ct. R. 17.1, for granting a writ of certiorari herein. This is a private dispute between a corporation and a few of its former shareholders. The Fifth Circuit's decision upholding the judgment of the District Court and jury does not conflict with any decisions of this Court, any federal court of appeals or any state court of last resort. The decision does not depart from any accepted or usual course of proceedings and does not involve any unsettled questions of law. There is no issue in this case that has significance to anyone other than the parties.[1] Each issue raised by petitioner herein involves the application of admitted facts to well-settled principles of law. From both the procedural and substantive points of view, there are over-

1 The Fifth Circuit did not issue a written opinion, relying on a local rule that permits it to refrain when, in its judgment, a written opinion would have no precedential value. *See* Order of Affirmance, April 13, 1987, citing Fifth Circuit Rule 47.6. It is set forth in full in the Appendix to the Petition.

whelming reasons for denying the writ on what we must call this frivolous application.

A. All of the fraud and the fiduciary duty claims are not only barred by the Texas two-year statute of limitations, but were unproved on the merits as well (so found by the jury or the District Court, and affirmed by the Fifth Circuit).

B. The RICO claim, dismissed by the District Court on the merits, affirmed by the Circuit, was unproved in all respects, and in particular because no facts were presented showing even one predicate violation, and no pattern of racketeering was even mentioned except in the complaint and the briefs of petitioners.

C. The tender offer was not a redemption, *de facto* or otherwise, or a breach of contract, because the Amended Certificate of Incorporation of Nabisco Brands, Inc. in 1961 does not require redemption of a preferred issue unless the company is in liquidation, in dissolution, or winding up its affairs, none of which occurred, and the Certificate, which permitted redemption at the option of the Board, also permitted the Company to purchase its Preferred Stock at any time. No shareholder was required to sell. (P Ex. 2, Appendix p. 1a)

On the breach of contract claim, we refer again to the Certificate. There is no contractual right in the shareholders to have their shares redeemed. NBI had an absolute right, by any legal method, to offer to buy and to sell its shares. Moreover, the jury disposed of the contract claim in any event by its verdict that plaintiff suffered no damages from any breach of contract.

D. With respect to the claim that "Nabisco's unilateral action causing the delisting of the $3.50 stock was an *ultra vires* act" (Count VII of the Complaint) and its handmaiden, "coercion," we refer to the Certificate as supporting the Directors' vote, and point out that such delisting was not NBI's unilateral act; that the law required disclosure of the

potential delisting; and that neither the District Court, nor the jury, nor the Fifth Circuit found it coercive.

ARGUMENT

I

THE TWO-YEAR STATE STATUTE OF LIMITATIONS BARS PETITIONERS' FRAUD AND BREACH OF FIDUCIARY DUTY CLAIMS

Petitioners have argued that the judgment was incorrect because (1) the applicable statute of limitations for fraud and breach of fiduciary duty is four years, not two years, and (2), in any event, the cause of action accrued when the tender offer expired, not on the date petitioners knew or should have known of any wrongful or misleading conduct.[2]

A. There Are No Special And Important Reasons For This Court To Determine Whether Texas Would Apply a Two or Four-Year Statute To The Fraud and Breach of Fiduciary Duty Claims

Respondent respectfully suggests that the time of this Court (as well as that of respondent), has been imposed upon by asking it to review well-settled issues of Texas law. The Fifth Circuit, in *Coastal Distributing v. NGK Spark Plug Co., Ltd.*, 779 F.2d 1033 (5th Cir. 1986), held that Texas would apply a two-year statute of limitations to actions for fraud. Petitioners have quoted the relevant portions of that decision in their papers, and they will not be repeated herein. The Fifth Circuit reconsidered that decision in *Corwin v. Marney, Orton Invest-*

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2 The fraud counts alleged violations of §§ 10(b), 13(e) and 14(e) of the 1934 Act and the rules promulgated thereunder, § 17(a) of the 1933 Act and § 27.01 of the Texas Business and Commerce Code. Petitioners argument concerns only those alleged violations that rely on the 1934 Act. We refer to these counts collectively as "the fraud counts." Section 17(a) of the 1933 Act was abandoned by petitioners at trial, and dismissed by the court. TR 147.

ments, 788 F.2d 1063 (5th Cir. 1986), and in the instant action, and did not alter its view. Since *Coastal* was decided on January 2, 1986, to respondent's knowledge, neither the courts nor the legislature of Texas have rendered any decision or taken any action inconsistent with the ruling in *Coastal, Corwin*, or the case at bar.

It is well-settled in Texas that the claim of breach of fiduciary duties by the directors is also subject to the two-year statute. *See International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963); *Redman Industries Inc. v. Couch*, 613 S.W.2d 787 (Tex. Civ. App. 1981), *ref'd n.r.e.; Wakefield v. Bevly*, 704 S.W.2d 339 (Tex. Civ. App. 1985).[3]

And *see Gearhart v. Smith International, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984) where the court held that directors owe duties of "obedience, loyalty, and due care" to the corporation, not the shareholders, who were held to lack standing to assert breach of fiduciary claims against the directors except in a derivative action. Petitioners at bar did not sue the directors.

Generally, issues of state law do not fall within the reach of matters that the Court has indicated it will hear. Sup. Ct. R. 17.1. In *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018 (1944) the Court, in a *per curiam* decision, noted:

> The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. . . .

The instant action is not such an exceptional case. Petitioners have suggested no reason, and have supported none, to ask

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3 Petitioners cite *Peek v. Berry*, 143 Tex. 294, 184 S.W.2d 272 (Tex. 1944) and *Graham v. Turner*, 472 S.W.2d 831 (Tex. Civ. App. 1971) in support of their argument that the four year statute applies. Both of these cases involve a suit by one shareholder against another to create a constructive trust. In such cases, Texas courts have applied the four-year statute. In breach of fiduciary duty cases not falling within this narrow category, the two-year statute has been applied, as in *Holloway, Redman* and *Wakefield, supra*.

this Court to treat the state and federal decisions as inconclusive and deviate from its general practice.

B. That The Fraud And Breach Of Fiduciary Claims Accrued When Petitioners Knew Of The Fraudulent Conduct Is Also Well Settled And Presents No Novel Or Significant Issues Of Law

It is a mundane observation under the law of Texas and the Fifth Circuit that an action for securities fraud accrues when the plaintiff knew or should have known of the fraudulent conduct complained of, *e.g.*, *Breen v. Centex Corp.*, 695 F.2d 907 (5th Cir. 1983). The jury found, as a matter of fact, that petitioners knew or should have known of such allegedly fraudulent conduct by NBI more than two years before the action was commenced. REC 7.

Petitioners urge, however, that the action accrued not when they knew or should have known of any fraud, but sometime later, when the tender offer expired. Their theory is that the offer could have been amended at any time before the expiration date, and therefore petitioners suffered no legal injury before that date. Petitioners tendered their shares before the offer expired.

Petitioners have not suggested any conflict among the circuits or any state law or other reason in support of reviewing this issue. Indeed, the other federal circuit courts that have decided the accrual issue are in agreement with the District Court and the Fifth Circuit.[4]

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4 *See Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978); *Klein v. Shields & Co.*, 470 F.2d 1344, 1346 (2d Cir. 1972); *Herm v. Stafford*, 663 F.2d 669, 682 (6th Cir. 1981); *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975); *cert. denied*, 425 U.S. 943, 96 S.Ct. 1682 (1976); *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 692 (8th Cir. 1981); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir. 1984), *cert. denied*, 469 U.S. 932, 105 S.Ct. 329 (1984); *Richardson v. MacArthur*, 451 F.2d 35, 39 (10th Cir. 1971); *Diamond v. Lamotte*, 709 F.2d 1419, 1420 (11th Cir.), *reh. den.*, 716 F.2d 914 (1983).

The only authorities cited by petitioners in support of their argument are *Bauman v. Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980), and *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967). Neither is apposite.

In *Bauman*, plaintiff had entered into an arrangement by which stock in the defendant was placed in escrow, subject to an "earn-out" based on the defendant company's performance for the next four years. At the end of the four-year period (March 31, 1975), plaintiff was to receive all of the stock, some of it, or none, depending on the company's success during those four years. Although the fraud was committed in 1970, when plaintiff entered into the arrangement, it was not until 1975 that it was or could have been determined that he would not receive any stock. Accordingly, the court held that the cause of action accrued on March 31, 1975, when the results of the "earn-out" became manifest.

In the instant case, the alleged fraud was so manifest to Cerf Hirsch before August 15, 1983 that *during the tender period*, he supplied information to newspaper men suggesting unlawful activity by NBI and complained to the Chairman and CEO of NBI. R Ex. 2-A through 2-F; R Ex. 6; P Ex. 5. His position is not improved by his having purchased shares during the tender offer, perhaps on the somewhat astonishing wish that at the last minute the offer would be converted to a redemption.

In *Atkins*, which involved a claim against an accountant for malpractice, there was no way to determine whether any injury had been suffered until long after the alleged malpractice was committed. The malpractice consisted of a failure by the accountant to obtain IRS approval, as required by the Internal Revenue Code, for use of the accrual method of accounting. It was not until later, when the tax commissioner assessed a tax deficiency against the plaintiff, who had paid taxes based on the accrual method without IRS approval, that it was known there was an injury. As in *Bauman*, it could not earlier be determined whether there was an act of malpractice, or

whether it would result in injury. And, not to put too fine a point on it, Atkins wasn't a fraud case.

In contrast, petitioners were told on the date they received the tender offer in May, 1983 that NBI would pay $50 per share for their stock. Any alleged legal injury occurred and was known by petitioners in that month when the tender offer arrived at their homes.

There is no reason for this Court to overturn the rule established by the courts below in this and other cases that the two-year statute applies and accrues in accordance with the rule charged by the District Court.

C. Petitioners, Having Made No Objection To The Two-Year Statute At Trial, Have Waived It

In any event, whether the four-year or the two-year statute applies is not properly before this Court. Petitioners waived the objection at trial.

Rule 51 of the Federal Rules of Civil Procedure provides, in pertinent part:

> No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

The District Court instructed the jury that the statute of limitations for the fraud and breach of fiduciary counts was two years, and that the claims accrued when petitioners knew or should have known of any wrongful or misleading conduct. TR 212-213. The jurors were given an interrogatory asking whether they found that petitioners knew or should have known of any wrongful or misleading conduct prior to August 15, 1983 (two years before the complaint was filed). The jury answered: "We do." REC 7.

Before the jury retired, petitioners' counsel made a number of objections to the judge's charge, but did not object to the application of the two-year statute. His objection on the issue of limitations included three points: (1), the jury should not have been told to pass over the interrogatories dealing with the substantive elements of the fraud claims if they found the claims time-barred, but instead should be made to answer all of the interrogatories unconditionally, so if a reversal on the accrual issue were later obtained, there would be no need for a new trial; (2), the claims did not accrue and the statute did not begin to run until August 18, 1983, at the end of the offer, and (3), the jury was informed that the burden of proof on this issue was on petitioners, not respondent. The verities of these points aside, there is nothing in the objection that could properly be construed as an argument that the limitations period should be anything other than two years. The full text of the objection dealing with the limitations charge is as follows:

> We would object to the conditioning of Special Interrogatory No. 1 for the reason that it conditions the interrogatory as far as 10(b)5 causes of action, 2701, and as far as the breach of fiduciary duties, and if the Plaintiff is right and that as a matter of law the cause of action did not and cannot arise until August 18 of 1983. Then, in the event the Jury were to return a finding to Interrogatory No. 1 adverse at this time against the Plaintiff, and the case were to be appealed, an Appellate Court would have no findings on the remaining causes of action on which to base a judgment, and it would have no alternative other than to remand the case for a new trial, as opposed to rendering the case.
>
> Lastly, we believe that the instruction on the statute of limitations incorrectly places the burden of proof on the Plaintiffs to prove that it did not occur as upon the Defendants to prove that the statute of limitations has, in fact, run, and the cause of action did, in fact, begin where

it asks in the particular interrogatory and also in the instruction. REC Vol. III, 3.

Accordingly, the objection was waived. *See, e.g., Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 900 (5th Cir. 1970) (objection to jury instructions waived when the nature of the alleged error was not stated). Even if it had not been waived, the Fifth Circuit has decided the question of state law in accordance with Texas law. It had occasion to reconsider its decision twice and did not reach a different conclusion. Neither the courts nor the legislature of Texas have taken any action to express disagreement with these decisions.

II

APART FROM THE BAR OF THE STATUTE OF LIMITATIONS, THE FRAUD CLAIMS WERE NOT PROVED ON THE MERITS

In addition to being barred by the statute of limitations, discussed *supra*, all of these claims were disposed of by the District Court or the jury on the merits and the Fifth Circuit affirmed. They lack merit.

The elements of a claim for relief for a violation of section 10(b) [as well as 14(e)] of the 1934 Act are "(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury." *Huddleston v. Herman & MacLean*, 640 F.2d 534, 543 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375, 103 S.Ct. 683 (1983).

There was no misstatement or omission of a material fact in the tender offer. The only statement that was less than completely accurate related to the question: who initiates the process of delisting? A fact is material only if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote or act. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct.

2126, 2128 (1976). There is little possibility, let alone likelihood, that a shareholder would feel compelled to tender because NBI and not the Stock Exchange would initiate the process of delisting. The material fact was the probability of delisting, and in accordance with law, it was fully disclosed in the offer.

Proof of scienter is also lacking. This Court has defined scienter as "a mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 1380 n.12 (1976). There was no evidence of such intent or knowledge by NBI of the falsity of any representation. Petitioners do not pretend any in their brief.

Finally, there was no evidence of reliance. Cerf Hirsch understood the offer. He said as much at trial. TR 16. He was in the oil business, the real estate business; the stock market for almost 60 years, acquiring great experience, actively buying and selling; he was an auditor, a bookkeeper. TR 2-4. No one hoodwinked Cerf Hirsch. He told some of his friends when to buy and sell and sue. Inexplicably, he purchased additional stock during the period of the offer, and paid $51 for it! TR 61, 78-79, 90, 98.

June Meredith testified that she relied on what her husband told her, not on the representations of NBI. TR 99. Edmund Lewis and Jan Hirsch Van Horn, who did not testify at trial, proved no reliance. Joe Cordill testified that he also bought shares during the period of the offer "on the premise that Nabisco was obligated to pay $100 per share for that particular brand of Stock—that particular issue." TR 74-76. He thought "there may be a possibility they [NBI] may pay $100 per share," and he was aware that he was "taking a gamble." TR 83. He looked at the Tender Offer's warning of delisting, but did not believe it. TR 76. No reliance here.

Frank Bunton never tendered, bought some of his stock during the period of the offer, didn't read all of the Tender Offer, and "guess[ed]" that it was a fair statement to say that he "didn't rely on any of the language in there," and knew he

was taking a chance. P Ex. 3; TR 85, 86, 93-94. Again, no reliance.

Whatever the theory, there was no fraud under the 1934 Act.

III

THE RICO COUNT IS BASELESS

In Count V of their complaint, petitioners had asserted that NBI's "activities" constituted "willful fraud in connection with the purchase and sale of securities" and formed a "pattern of racketeering activity" in violation of RICO, 18 U.S.C. §§ 1961 *et seq*. That was the last anyone heard of that particular fraud or the pattern of racketeering in the case, except some generalizations in petitioners' brief and, of course, the District Court's dismissal of the count. NBI's motion for a directed verdict, made at the close of petitioners' case, was granted with respect to this claim with apparent agreement of counsel for petitioners. TR 144, 147. That decision was affirmed by the Fifth Circuit.

A decision by this Court on the RICO count would not break any new ground. A pattern of racketeering activity is defined in detail in § 1961(1) of the Act. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 3278 (1985), this Court summarized the definition as follows:

> RICO takes aim at "racketeering activity", which it defines as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law.

The class of "racketeering activity" that was alleged at bar was securities fraud. But there was no evidence of such fraud at trial, no evidence of even one predicate offense, not to

mention two. 18 U.S.C. § 1961(5). The trial judge said he was unaware of *any* evidence petitioners raised on the RICO issue, after which counsel for petitioners said:

> "We think thee (sic) is a fair amount—we think there's enough evidence to go to the jury, *assuming we get affirmative findings on the securities fraud.*" [Emphasis supplied] TR 147.

It was a rather baseless assumption on which to expect affirmative findings from the jury when the question addressed by counsel was whether there was enough evidence to get to the jury. In any event, the District Court did not think so and petitioners received no such findings from the jury. Nor do petitioners quote or paraphrase any evidence of fraud in the record. Instead, they conclude, without minor premise, that they introduced enough evidence of all essential elements of a RICO violation, citing TR 104-112, TR 167-170. P BR. 19.

This evidence is said to be in the excerpts from a deposition taken of Walter G. Dunnington, Jr., Executive Vice President and General Counsel of NBI. TR 102.

Petitioners' Brief, 19 relied on its *ipse dixit*, pointing to no evidence and no legal support for it. The reference to the testimony of Walter Dunnington, TR 104-112, fails to prove a violation of RICO. It has no relevance to any issue involved in a RICO count. Pages 167-170 of the transcript contain testimony by Ward M. Miller, Jr., NBI's Secretary. This testimony does not aid petitioners. His testimony, TR 167-170, discloses no evidence of racketeering activity. He merely set forth the accounting treatment of the preferred stock. It was properly listed on the balance sheet at $100 per share because that would be the amount due if the company were liquidated.

But assuming, *arguendo*, that the tender offer could, by some extraordinary alchemy, be transmuted into racketeering activity, it would be an isolated event. It does not amount to a pattern. Not a single predicate offense was shown in the evidence. Without two predicate offenses, there is no RICO

cause here, and neither the District Court nor the Fifth Circuit erred in dismissing it.

IV

RESPONSE TO SOME ADDITIONAL ARGUMENTS OF PETITIONERS

A. *De Facto* Redemption

Unable to establish that NBI was required to redeem, petitioners assert that the tender offer was or should be treated as a *de facto* redemption because it violated, as a matter of law, the rights of the holders granted in the Certificate of Incorporation, and coerced them into tendering their stock by pointing out in the offer the possibility (probability, if they prefer) of delisting. Of course, they have offered no evidence or authority in support.

No matter how many times petitioners repeated these charges and others, they did not at the trial persuade anyone of their validity, nor in the Circuit Court, and in their petition they have pointed to no evidence to support any of the charges.

There is no evidence that NBI in any measure violated the requirements of its Amended Certificate of Incorporation or its contract with the shareholders. There was none at the trial and there is none here. NBI faithfully adhered to its Amended Certificate. (See Appendix, p. 2a in particular, P Ex. 2, 4, ¶ 4(B)(4); P Ex. 3, 4).

Petitioners have not shown that what they choose to call a redemption was a redemption and not a tender offer, except by reference to Webster. The indicia of redemption are not satisfied by a tautological definition from Webster that redemption means purchase. While some redemptions are purchases, not every purchase is a redemption; indeed, without more, few purchases are redemptions. *See Webster's Ninth New Collegiate Dictionary, 1983, p. 956 and p. 986.*

B. Coercion

Because the offering documents suggested that NBI intended to apply for delisting at the end of the offering of the $3.50 cumulative preferred stock, petitioners urge coercion. NBI did not in fact apply for delisting. Such delisting was initiated by the New York Stock Exchange in accordance with its § 802.00 (which provides that the Exchange will consider delisting the shares of an issue if their aggregate value falls below $2,000,000 or the number of publicly-held shares falls below 100,000). In such case, application to the SEC for approval to delist is discretionary with the Exchange. R Ex. 13, §§ 801.00, 802.00.

NBI did inform the Exchange (as required by the Rule) of the end and result of the tender offer. Reasonably anticipating that both tests would almost certainly be met (there were only 119,992 shares held by 760 record holders subject to the offer, P Ex. 3, 2), NBI set forth the information about the probability of delisting in the offer to assure that the shareholders were made aware of it. Actual delisting was not in the hands of NBI, but of the Exchange and the SEC.

Moreover, in a tender offer, even the possibility of delisting is a material fact that must be disclosed to shareholders. Disclosure of the probability, not who would make the application, is the requirement. The shareholders must be and were told. It was a "sufficiently appreciable" fact. Failure to have done so would have been a violation of the 1934 Act, § 14(e). *Missouri Portland Cement Co. v. H. K. Porter Co., Inc.*, 535 F.2d 388 (8th Cir. 1976). After the offer, less than 23,000 shares of the NBI $3.50 cumulative preferred stock remained in public hands with a value well under $1,000,000, on any theory of value. TR 149; R Ex. 10.

There was no material misstatement, and no coercion. The anticipated procedure is, in any event, irrelevant to the shareholders. If required disclosure can be judged coercive, the statement that the Exchange might apply for delisting would have been even more so.

Finally, NBI, as issuer, could have initiated the application for the delisting. A security may be withdrawn from listing "upon application by the issuer or the Exchange to the [Securities Exchange] Commission." R Ex. 13, § 808.00 quoting § 12(d) of the Securities Exchange Act of 1934, 15 USC § 781(d).

This case had its genesis in no applicable legal theory and is without factual substratum. Petitioners simply wanted more than they received. They wanted it before the District Court. They wanted it before the jury. They wanted it before the Fifth Circuit. All have agreed they are not entitled to it. There is no basis for this Court to consider this matter anew.

CONCLUSION

WHEREFORE, for the reasons set forth above, respondent respectfully prays this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorney for Respondent
Nabisco Brands, Inc.

CERTIFICATE OF SERVICE

I, Burton H. Brody, do hereby certify that on September 17, 1987, I served, via prepaid first class mail, three (3) copies of the foregoing Response to the Petition For a Writ of Certiorari on Counsel of Record for Petitioners, Bruce W. Bowman, Jr., Messrs. Vial, Hamilton, Koch & Knox, 1500 First Republic Bank Center, Tower II, Dallas, Texas 75201-3890.

I further certify that all parties required to be served have been served.

Burton H. Brody

Counsel of Record for Respondent Nabisco Brands, Inc.

APPENDIX

Restated Certificate of Incorporation of
Nabisco Brands, Inc.
(P Ex. 2, 1-6)

Relevant provisions of the Restated Certificate of Incorporation are set forth below.

"PREFERRED STOCK

"(A) Preferred Stock of the Corporation may be issued in various series, as may be determined from time to time by the Board of Directors, each of such series to be distinctly designated. All shares of any one series of Preferred Stock shall be alike in every particular and all series hereafter created shall rank equally and be identical in all respects, except as hereinafter in subdivisions (1) to (6) inclusive of this Clause (A) set forth:

* * *

"(3) the Preferred Stock of any series may, but need not be, made redeemable at the option of the Corporation as a whole or from time to time in part, at such times, and at such price or prices per share (plus in every case an amount equal to all dividends on such share accrued and unpaid up to the date fixed for redemption, whether or not the same shall have been declared or earned), all as may be fixed by the Board of Directors in the resolution or resolutions providing for the issuance of the Preferred Stock of such series. P Ex. 2, 1.

* * *

"(B) The following provisions shall apply to all the Preferred Stock irrespective of any variation between the Preferred Stock of the different series:

* * *

"(3) Upon any dissolution, liquidation or winding up of the Corporation, voluntary or involuntary, the holders of the Preferred Stock of each series shall be entitled to receive out of the assets of the Corporation (whether capital or surplus) the amount or amounts per share fixed

for the respective series, plus in the case of each share, an amount equal to all dividends on such share accrued and unpaid . . . before any distribution of the assets to be distributed shall be made to the holders of the Common Stock of the Corporation . . . P Ex. 2, 3.

* * *

"Nothing herein contained shall limit any legal right of the corporation to purchase any shares of the Preferred Stock." P Ex. 2, 4, ¶ 4(B)(4).

* * *

$3.50 CUMULATIVE PREFERRED STOCK

* * *

"(1) * * *

"(2) The amounts payable on shares of such series on dissolution, liquidation or winding up of the Corporation shall be: $100 per share in case of involuntary dissolution, liquidation or winding up of the Corporation, and the then current redemption price per share in case of voluntary dissolution, liquidation or winding up of the Corporation . . .

"(3) The shares of such series shall be redeemable at the option of the Corporation at any time in whole or from time to time in part, at a price of $100.00 per share; plus in each case (as provided in the Certificate of Incorporation) an amount as to each share equal to all dividends on such share accrued and unpaid up to the date fixed for redemption." P Ex. 2, 6.

The Tender Offer
(P Ex. 3, 4)

Relevant provisions of the tender offer are set forth below.

"2. SPECIAL FACTORS.

(a) . . .

(b) *Effects of the Offer.* . . .

"It is not possible to predict how many shares of the $3.50 Preferred Stock will be properly tendered pursuant to the offer. Upon completion of the Offer, however, the Company intends to apply for the delisting of such stock from trading on the New York Stock Exchange and the termination of registration of such stock under the Securities Exchange Act of 1934. The delisting could adversely affect the liquidity or future market value of shares of $3.50 Preferred Stock which are not tendered.

(c) *Fairness of the Offer.* . . .

"In deciding upon the fairness of the Offer, the Company considered the current and historical market prices of the $3.50 Preferred Stock, as well as prices of preferred stocks issued by other major U.S. corporations. As indicated on page 6, the market price per share of $3.50 Preferred Stock has ranged from a high of $42 to a low of $25.75 from January 1, 1981 to immediately prior to the announcement of this Offer on May 13, 1983. The market price ranges of preferred stocks of other major U.S. corporations since January 1, 1981, have been at comparable levels, when adjusted for individual dividend rates.

"The last sale price of $3.50 Preferred Stock on the New York Stock Exchange immediately prior to the press announcement of this Offer on May 13, 1983, was $42 per share. The Offer price therefore represents a premium of nearly 20% over the market price of the $3.50 Preferred Stock prior to the announcement of this Offer.

"The holders of $3.50 Preferred Stock who elect to tender their shares will thus realize a significant premium over market prices for such shares prior to the announcement of the Offer. Realization of the liquidation preference of $100 per share, payable in the event the Company should be liquidated, is an extremely remote possibility in view of the Company's current financial position.

"WITH RESPECT TO REDEMPTION RIGHTS, THE COMPANY HAS NO PRESENT INTENT TO REDEEM ANY SHARES OF ITS $3.50 PREFERRED STOCK, REGARDLESS OF HOW MANY SHARES REMAIN OUTSTANDING UPON EXPIRATION OF THE OFFER."